No. 2840

United States

Circuit Court of Appeals

For the Ninth Circuit.

MARY N. LUCAS,

Plaintiff in Error,

vs.

WALTER W. SCOTT, a Minor, JANET M. SCOTT, a Minor, RUBENA F. SCOTT, a Minor, and the BISHOP TRUST COMPANY, LIMITED, a Corporation, Guardian of the Estate of said WALTER W. SCOTT, JANET M. SCOTT and RUBENA F. SCOTT, Minors,

Defendants in Error.

BRIEF ON BEHALF OF DEFENDANTS IN ERROR.

Upon Writ of Error to the Supreme Court of the Territory of Hawaii.

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In the United States Circuit Court of Appeals for the Ninth Circuit.

MARY N. LUCAS,

Defendant, Plaintiff in Error,

vs.

WALTER W. SCOTT, a Minor, JANET M. SCOTT, a Minor, RUBENA F. SCOTT, a Minor, and the BISHOP TRUST COMPANY, LIMITED, a Corporation, Guardian of the Estate of Said Walter W. Scott, Janet M. Scott and Rubena F. Scott, Minors,

Plaintiffs, Defendants in Error.

SUBMISSION OF CASE ON AGREED FACTS.

ON WRIT OF ERROR TO THE SUPREME COURT OF HAWAII.

Brief on Behalf of Defendants in Error.

I.

STATEMENT OF THE CASE.

The defendants in error agree and adopt the statement of the case made by the plaintiff in error except in the following particulars:

1. All questions as to conformity with Hawaiian statute (Sections 2381–2385, R. L. 1915), in making the submission to the Territorial Supreme Court, have been disposed of by the fact that the court below, in construing the local statute, entertained jurisdiction of the case and rendered judgment therein.

2. The defendants in error do not admit that the plaintiff in error has acquired all of the right, title and interest of the sons, and of all the daughters, with the exception of Catherine, the mother of the defendants in error, herein (Plaintiff's Brief, pp. 3 and 4), but admit that the plaintiff in error claims to have acquired all such right, title and interest, excepting as aforesaid.

3. If the statement by the plaintiff in error of the contention of the defendants in error (Plaintiff's Brief, pp. 5, 6, and 7), is intended to describe the contention made by the defendants in error before the Supreme Court of Hawaii, it has no place in the record, nor have the contentions of the plaintiff in error urged before the court below. The decision and judgment of the court below is the thing appealed from. Nowhere in the Transcript of Record in this case before this Court is there included the briefs, arguments or contentions made by the parties before the court below. If the statement is intended to represent the contentions that will be made by the defendants in error before this Court, the defendants in error decline to accept the description thereof, or the allusion thereto, made by the plaintiff in error, and reserve the right to state the same for themselves in this, their brief and argument.

4. In regard to the statement made by the plaintiff in error (Plaintiff's Brief, pp. 7, 8, and 9), as to the majority opinion, and as to the minority opinion, of the decision appealed from, the defendants in error make the following statement: The majority

opinion of the court below held, against the contention made by the plaintiff in error that the words of survivorship relate to the expiration of the 25 year lease period, that such contention was disposed of by the decision of the Supreme Court of Hawaii in *Bertelmann* vs. *Kahilina,* 14 Haw. 378, construing the same will. The majority opinion held:

> "The former decision, * * * (Kahilina case), which simplified and narrows the questions here to be decided, correctly holds that the acquisition of the interests of the daughters under the will by the sons, or one or more of them, was a mere privilege which depended upon a condition precedent—the payment of the prescribed sums—while the defeasance of the vested remainder in the daughters depended upon a condition subsequent—the payment to each daughter of the sum of $5,000 at the time and in the manner prescribed in the will." (Tr., pp. 84 and 85.)

The majority opinion, appealed from, did not hold, as set forth in the brief of the plaintiff in error (Plaintiff's Brief, p. 8): "that the condition named in Article 'Third' required as one of the elements, the payment of $5,000 *to Catherine personally in her lifetime,"* (the italics are those of the plaintiff in error). The decision was that, by reason of Catherine's death before the expiration of the 25 year lease period, the condition prescribed in Article "Third" of the will became impossible of performance both as to her and as to her children, defendants

in error herein, who inherited from her. (Tr., pp. 87, 88.) The opinion further held that there was no provision in the will whereby the estate, which was vested in Catherine under the decision in the Kahilina case, could "be divested in any mode or manner other than the one prescribed in the will itself, i. e., the payment to her of $5,000, a privilege granted to the sons, or one or more of them, by the testator." (Tr. p. 86.)

II.

RE-STATEMENT OF ERRORS ASSIGNED.

(a) *Errors 1, 2, 3, 4, 5, 6, 7, 15, 16, 19 and 20* may be re-stated as follows:

The court below erred in holding and rendering judgment, or in holding and rendering judgment upon the theory and to the effect, that Catherine's children inherited their mother's interest and are now the absolute owners of a one-ninth interest of the lands referred to in Article "Third" of the will, freed from the condition of defeasance, indefeasible by any act of the plaintiff in error, or by one or more of the sons, and not defeasible, nor acquirable, by the plaintiff in error, or by one or more of the sons, upon the payment by her or them, or by one or more of the sons to the children, or their guardian, of the sum of $5,000 within one year after the expiration of the 25 years' lease referred to in the will, and in holding that said three children have now any right, title or interest in the lands, or right to the payment of $5,000, and in holding that Mary N. Lucas has no right, claim, title or interest in said one-ninth interest held to belong to the three children, and in not

holding Mary N. Lucas is the "indisputable" owner of all the lands in question and of said one-ninth interest without payment to Catherine, or to her children, and in not holding that neither Catherine's children or their guardian have no right, title or interest in the lands in question, nor to the payment of $5,000.

These errors, summarized, comprise a statement of the whole appeal from that section of the majority opinion appealed from which is not covered by the decision in the Kahilina case. These errors raise the point as to what does, or does not, constitute a performance of the condition described in Article "Third" of the will.

(b) *Errors 8, 13, 14, 16 and 26* may be re-stated as follows:

The court below erred in holding that the death of Catherine before the expiration of the 25 year lease period, who held a vested remainder in fee subject to defeasance by a condition subsequent, rendered the performance of the condition impossible of performance and left the vested remainder freed of the condition; in holding that the performance of the condition required payment to Catherine personally, and that a payment to Catherine's children would not be a performance; and in not holding that, irrespective of the death of Catherine, the condition was possible of performance.

These errors, summarized, raise the point of *impossibility of performance* of the *condition,* as set forth in the majority opinion appealed from.

(c) *Errors 9, 10, 11, and 17,* may be re-stated as follows:

That the court below erred in holding that under the will Catherine took a vested remainder in fee subject to defeasance upon the performance of a condition subsequent and in failing to hold that she took an interest contingent upon conditions precedent and in not disaffirming the former decision of this court in *Bertelmann* vs. *Kahilina,* 14 Haw. 378; and in holding that the will "shows a manifest intent," on the part of the testator, "that his three sons and six daughters should share equally."

These errors, summarized, contain the point that this court should follow the *minority and not the majority opinion* in the Kahilina case.

(d) *Errors 18, 27, 28, and 29* may be re-stated as follows:

That the court below erred in holding the right or privilege granted by the will in Article "Third" "seems personal"; that the court below erred in holding that the right or privilege given the sons by clause "Third" of the will was not assignable and could not be exercised by their assignee, Mary N. Lucas.

These errors raise the point of *personal option or privilege and assignability thereof.*

(e) *Errors 22, 23, 24, and 25* may be re-stated as follows:

That the court below erred in holding that the words of survivorship in the phrase "surviving daughters," wherever it occurs in Article "Third" of the will, refer to the death of the testator, and not

to the expiration of the 25 year lease period; and in holding that Catherine was, and in not holding that she was not, a "surviving daughter," within the meaning of Article "Third."

These errors, summarized, raise the point of meaning of "*surviving daughters.*"

(f) *Error 21* may be re-stated as follows:

That the court below erred in not holding that, even if Catherine's children now have her interest in the lands, Mary N. Lucas has a right to defeat that interest and acquire it for herself by payment to them or their guardian of the sum of $5,000, and thus render her title in all the lands absolute as against said children.

This error expressed the *minority opinion* in the decision appealed from.

III.

CONDENSED STATEMENT OF THE ARGUMENT OF PLAINTIFF IN ERROR.

The contentions of the plaintiff in error, as set forth in her brief, may be grouped under five general headings, as follows:

III–A.

That the entire provisions of the will are now open for construction by this court on appeal; that the question of the *kind and nature of estate taken by Catherine* under the will is open for construction by this court.

Under this heading the 1st, 2d, 3d, and 4th headings of the argument of the plaintiff in error may be grouped, that is:

(1) "No unusual weight attaches to the majority opinion appealed from."

(2) "The doctrine of *stare decisis* and that of *res judicata* inapplicable in favor of the Kahilina decision."

(3) "The majority opinion in the Kahilina case was incorrect."

(4) "Immaterial whether devise to daughters was of a vested or a contingent remainder or a conditional limitation."

This group appears, but it is not so admitted, to cover Errors 9, 10, 11, 12, and 17.

In other words, this section of the argument appears to be designed to attempt to show that Catherine did not take a vested interest under the will of her father in the lands referred to in clause "Three" of the will defeasible upon the performance of the condition therein named, as was held by the majority opinion in the Kahilina case, but that she took some other interest subject to such defeasance, as was held in the minority opinion in the Kahilina case.

III–B.

That Catherine's interest, whether vested or by way of a contingent remainder, or conditional limitation, was defeated by her death before the expiration of the 25 year lease period and that her children, the defendants in error herein, did not inherit any interest or estate in said lands from her.

Under this heading the 5th, 6th, 7th, and 8th headings of the argument of the plaintiff in error may be grouped, as follows:

(5) "Words of survivorship—rules of construction—to what period referred."

(6) "Devise to individual—death before testator—lapse."

(7) "Devise to a class—death before testator—survivors take all."

(8) "Construction of will of Bertelmann—what contingencies stated in Article 'Third' are. 'Surviving daughters' means those surviving at the expiration of the 25 year lease."

This group appears, but it is not so admitted, to cover Errors 22, 23, 24, and 25.

In other words, this section of the argument is designed to open again the question of *survivorship* with reference to the kind of estate given to Catherine and, by this means, seek the opportunity of applying rules of construction, where words of survivorship are used, to the divesting of Catherine's estate, irrespective of the fact that the kind and nature of the estate given Catherine under the will has been twice passed upon by the Supreme Court of Hawaii.

III–C.

That the condition described in clause "Three" of the will, and held in the majority opinion appealed from to be a condition subsequent, was not rendered impossible of performance by the death of Catherine prior to the expiration of the 25 years' lease.

This contention is set forth under heading 11 of the argument of the plaintiff in error, as follows:

(11) "The so-called condition subsequent has not become impossible of performance. Even if Catherine's children now own a one-ninth interest, the plaintiff in error is entitled to pay them $5,000 and thus defeat their interest and herself become the 'undisputable' owner of all of the lands mentioned in Article 'Third.' "

This appears, but it is not so admitted, to cover Errors 8, 13, 14, 16, 21, and 26.

This contention expresses the minority opinion of the decision appealed from—that is, that Catherine's children have a present vested interest in fee which can be defeated by the payment of $5,000 to them by the plaintiff in error, the assignee of the sons named in the will.

III–D.

That the privilege or option given by Article "Third" of the will to the sons is not personal and is assignable, and not as held by the decision appealed from, personal and nonassignable.

Under this heading the 12th, 12a, 12b, 12c, 13th, and 14th sub-headings of the argument of the plaintiff in error may be grouped, as follows:

(12) "Assignability of sons' interests."

(12-a) "Assignability of vested remainders."

(12-b) "Assignability of contingent remainders and executory devises."

(12-c) 'The common-law rule, if any, in restraint of alienation is not law in Hawaii. Complete freedom of alienation is the rule and policy in Hawaii."

(13) "The sons' personal privilege or right to pay $5,000 and to cause the lands to befall to them was not purely personal but assignable."

(14) "Option."

This group appears, but it is not so admitted, to cover Errors 18, 27, 28, and 29, and brings up the question of *assignability of sons' interest.*

III–E.

That the argument advanced by the defendants in error, and that some of the cases cited in their brief in the lower court, are erroneous in the opinion of the plaintiff in error, in the one case, and inapplicable, or in favor, of the plaintiff in error, in the other.

Under this heading may be grouped the 9th and 10th headings of the brief of the plaintiff in error, as follows:

(9) "Comments on argument for defendants in error."

(10) "Comments on cases cited for defendants in error in the court below, and probably to be cited in their brief in this court."

The defendants in error are compelled to say in this regard that nowhere in the assignment of errors of the plaintiff in error, copious as those assignments are, is there a single error assigned which will support argument of this character. The briefs and argument of counsel, both sides, were crystallized by the decision of the Court below. The question before this Court on appeal is, was that decision right

or wrong, and, if wrong, which is not admitted, wherein is it wrong, not what either counsel said or did in their briefs and argument before the lower court. As far as the Court is concerned there is nothing in the Transcript of Record showing what counsel did or did not do in the way of brief or argument in the lower court. Hence, the defendants in error do not deem themselves compelled to answer the contentions made under headings 9 and 10 of the brief of the plaintiff in error other or further than as above stated, and they do no more with regard to the kind of argument or character of citations they intend to make before this Court than to set the same down in this, their brief.

IV.

REJOINDER OF DEFENDANTS IN ERROR TO ARGUMENTS OF PLAINTIFF IN ERROR.

A.

As above set forth, the first four headings of the brief of the plaintiff in error amount to an assertion that this Court shall, on this appeal, reopen the Kahilina case; that the majority decision of the Supreme Court of Hawaii in the Kahilina case is incorrect; that the decision is not *res judicata;* that what Catherine took under the will is again open for construction; and that no unusual weight attaches to the majority decision of the Supreme Court of Hawaii affirming the majority opinion in the Kahilina case. These four headings and arguments of the plaintiff in error will be treated separately below.

A. (1)

Weight to be given majority opinion appealed from. (Plaintiff's Brief, p. 16.)

Plaintiff in error, under this heading, confined her objection to the majority opinion of the decision appealed from, and does not here state any objection to the minority opinion of the decision appealed from.

The statement may be made at this stage of the argument that the plaintiff in error, at this and in other parts of her brief, indicated that she would be satisfied with the minority opinion of the decision appealed from, provided her other contentions fail. The defendants in error urge that the majority opinion of the decision appealed from should prevail, but, failing that, the minority opinion should prevail.

On July 29, 1902, more than fourteen years ago, the Supreme Court of Hawaii handed down its decision in the case of *Bertelmann* vs. *Kahilina,* 14 Haw. 378. In that case the will of Christian Henry Bertelmann, now before this Court, was up for construction by the Court. The question before the Supreme Court of Hawaii then was, the nature and quantity of interest taken by the beneficiaries under the will, the will appearing to set the beneficiaries out in three groups—that is, the sons and daughters as one group, the sons as another group, and the wife as another group, for the purpose of making different dispositions as to groups, but not as to classes as that term is sometimes used in wills. The decision of the court (there also was a minority opinion), did not go any further, at that time, than to determine the kind

and quantity of estate taken by each of these beneficiaries, in groups, in the property devised them by the will. In other words, having established the nature and quantity of the estate so taken or acquired, the Court did not construe the will further as to what would become of such interest under the contingencies and conditions mentioned and described in other provisions of the will. The minority as well as the majority opinion, in that case, used the same division into groups of beneficiaries, but differed with the majority opinion as to the nature and quantity of estate taken by each group. The majority in that case held as follows:

> "The widow has a life estate in one-third of the land, subject to be divested by the performance of the conditions prescribed in the third item, in which case she will thereafter have a fixed sum of $2000.00 a year, which will be a charge on the land."
>
> "The children have equal vested estates in fee, subject to the widow's interest, defeasible as to the interest of the daughters and shortcoming sons upon the performance of the prescribed conditions by the other son or sons, the sons having meanwhile contingent executory devises as to such interest."
>
> *Bertelmann* vs. *Kahilina,* 14 Haw. 378.

To summarize:

(1) The widow had a life estate in one-third of the land.

(2) The children, each and individually, sons and daughters alike, had equal vested estates in fee in the land.

(3) The sons, as a class, with survivorship provided for, had contingent executory devises as to the interest of the daughters and of the shortcoming sons.

In the case now pending before this Court on appeal, the Supreme Court of Hawaii again had the same will under consideration and took up the question, not determined in the decision in the Kahilina case, what, under certain other provisions and conditions of the will, became of the vested interest given to Catherine, she having died after the testator and before the expiration of the 25 year lease period, leaving children surviving her, her husband and mother having pre-deceased her. The Court, in both minority and majority opinions, the Court being of entirely different personnel than that in 1902, affirmed the majority decision in the Kahilina case—that is, that Catherine took a vested estate in fee in the lands described in the will of her father, subject to be divested upon the performance of certain conditions named in the will.

The majority opinion went further and held that, because of the death of Catherine before the expiration of the 25 year lease period, the conditions prescribed in Article "Third" of the will became impossible of performance, and that her children, they having inherited their mother's interest, are now absolute owners in fee of an undivided one-ninth interest in the lands described in the will freed from the di-

vesting condition; that the privilege or option given the sons by Article "Third" of the will, being personal in character, could not be assigned to the plaintiff in error, and, hence she could not exercise that privilege or option against any of the beneficiaries named in the will, including Catherine and, after her, her children.

The minority opinion, after affirming the decision in the Kahilina case, as above stated, that Catherine had a vested interest in fee in said one-ninth of the lands subject to defeasance by the performance of the conditions expressed in Article "Third" of the will, holds that, as to the performance of the condition, the predominating intent of the testator, as gathered from the will, that his sons or some or one of them might acquire the interest of all the others after the expiration of the 25 year lease period, at a stated sum, to wit, $5,000, should prevail and should not be defeated by a requirement of literal performance of a condition precedent; and that, hence, Catherine's one-ninth interest, which descended to her heirs, could be defeated, as to those heirs, by the payment to them of $5,000; and holding further that the right or privilege given the sons by Article "Third" of the will was not a mere privilege which could not be assigned to and exercised by the vendee of the sons.

It will not be urged by the defendants in error that more weight should be given the majority opinion appealed from, based, as it was, on the majority opinion thirteen years previous in the Kahilina case on the same will, than this Court by its custom and

usage, and in its discretion, should see fit to place thereon. The defendants in error believe that they should do nothing more in this relation than to call this Court's attention to the majority opinion of the Supreme Court of Hawaii in the Kahilina case, the long lapse of time between that opinion and the majority opinion of the Supreme Court of Hawaii now appealed from, and the affirmation, in the opinion appealed from, in both majority and minority opinions, of the principles laid down in the Kahilina case, and urge that this Court should, under all circumstances, give some weight to the majority opinion appealed from, without urging or appearing to urge that unusual weight should or should not be given to such opinion.

These facts are presented to show this Court that the provisions of the Bertelmann will have been twice under careful consideration by the Territorial Supreme Court, and that being so, the majority opinion is entitled to some weight, the extent thereof being wholly within the province of this Court, and wholly without the province of either the defendants in error or the plaintiff in error.

It is conceded by the Supreme Court of the United States that the Federal Courts lean toward the construction placed on a local law by the Territorial Court, especially a construction adopted before annexation.

And it is well known that appellate courts, to which appeals lie from state courts, usually place some reliance or weight upon the findings of the lower court of last resort, of state or territory, as to

local customs, usages, and practices, in whatever relation they may occur, and upon such court's construction of local statute law. Again, the extent thereof is within the sole province of the appellate court. How much of that usage would apply to an appeal from an appellate court from a decision turning on the construction of a will, is not for the defendants in error to say; not even to say that unusual weight should not attach to such decision. The defendants in error urge nothing in this regard, leaving the same to the Court and relying upon the statement of facts above made, as to the construction that has twice been placed on the Bertelmann will by the Supreme Court of Hawaii, once as a court of last resort, once as a court from which an appeal lies to this Court.

A. (2)

Doctrine of stare decisis and of res judicata inapplicable in favor of Kahilina decision. (Plaintiff's Brief, p. 17.)

The *Bertelmann* vs. *Kahilina* case was decided by the Supreme Court of the Territory in 1902, about three years before the amendment of Section 86 of the Organic Act of the Territory (Act of April 30, 1900, 31 Sts. at L. 141, c. 339; 2 Supp. R. S. 1141), which permitted appeals to be taken from the Supreme Court of the Territory of Hawaii but *only* to the Supreme Court of the United States (Act of March 3, 1905; 33 Sts. at L. c. 1465, s. 3, as amended by act of March 3, 1909; 35 Sts. at L. c. 269, s. 1). Before Section 86 of the Organic Act was so amended

in 1905, the relation between Federal and Territorial courts were in general similar to those between the Federal and State courts; cases could be taken to the Federal Supreme Court from the Territorial Supreme Court, as from a State Supreme Court, only by writ of error and *only when a federal question was involved*, and could not be taken, as from other Territories, either by appeal to the Federal Supreme Court or at all to the Federal Court of Appeals.

> *Equitable Life* vs. *Brown,* 187 U. S. 309, 47 Law ed. 190.

In fact, it was not permitted to take a case by writ of error or by appeal from final judgments of the Territorial Supreme Court to the Circuit Court of the Ninth Circuit until the passage (13 years after the Kahilina decision) of the Act of January 28, 1915, which provides as follows:

> "Writs of error and appeals from the final judgments and decrees of the Supreme Courts of the Territory of Hawaii and of Porto Rico, wherein the amount involved, exclusive of costs, to be ascertained by the oath of either party or of other competent witnesses, exceeds the value of $5,000, may be taken and prosecuted in the circuit courts of appeals." (Act of January 28, 1915, at 38 Stat. at L. 804, c. 22.)

The decision in the Kahilina case finally disposed of the question of the kind or quantity of interest in certain lands devised by the will taken by the sons and daughters as a group, by the sons as a group, and by the wife of the testator. Catherine, the mother

of the defendants in error, personally and individually, took a present vested estate in fee, defeasible upon the performance of the condition described in clause "Third" of the will. The Supreme Court of Hawaii did not decide in the Kahilina case what acts or happenings would constitute a proper performance of the condition. There was no reason for the court to do so at the time. The only question before the court at that time was the kind or quantity of interest taken by the various beneficiaries, under the will. The question concluded, on the other hand, in the decision appealed from, and which comes up to this Court, and the only question before this Court, is the extinguishment or non-extinguishment of Catherine's vested interest in fee established in her by the Kahilina decision.

It appears from the Transcript of Record (Tr., p. 3), not directly but by reference to the Kahilina case, that Catherine, her sister Beatrice, and her brother Christian, were not named as parties to the Kahilina case. Nowhere is that fact alleged in the submission, but under stipulation, no advantage will be taken of a technical omission, if this is such.

The plaintiff in error cannot, nor can Beatrice or Christian, avoid the conclusions to be drawn against them from their own acts, nor can the plaintiff in error now take advantage of a right, which she asserts was Christian's and Beatrice's—that is, their right not to be bound by the decision in the Kahilina case, because Christian and Beatrice were not, as it appears, joined as parties in the Kahilina case. That case established a law of property which re-

mained unquestioned until this submission was argued before the lower court. It was affirmed by the various transfers of land hereinafter set forth, and is the law of the case before this Court.

The plaintiff in error claims to have acquired Christian's interest by deed, dated September 12, 1907 (Plaintiff's Brief, p. 4), five years after the Kahilina decision, which deed was recorded in the Hawaiian Registry of Deeds, September 14, 1907 (Tr., p. 33); and the interest of Beatrice, by deed dated October 12, 1904 (Plaintiff's Brief, p. 4), two years after the Kahilina decision, which deed was likewise recorded October 12, 1904 (Tr., p. 67). The paper title by record would therefore show as follows: that Christian Henry Bertelmann died February 15, 1895, seised of the lands in question (Tr., p. 2); that he left a will, which was duly admitted to probate in 1895, in which he left said lands to his children and wife; that in 1902, seven years after said will was admitted to probate, a decision was handed down by the Supreme Court of Hawaii, that court being at that time a court of last resort, determining the nature and quantity of interest taken by each of the children and by the wife under the Bertelmann will in the lands in question; that no appeal was or could be taken therefrom; that, at various dates from 1903 to 1915, the plaintiff in error secured separate deeds, purporting to convey all their interests in the lands in question, from all sons and daughters named in the will, with the exception of Catherine, which deeds are of record, and the dates of which are all subsequent to the date of the decision

in the Kahilina case (Plaintiff's Brief, p. 4); that before plaintiff in error secured a deed from one of the children, Frank, an assignment of mortgage, theretofore given by Frank to one Magoon, was assigned for valuable consideration to the plaintiff in error, July 28, 1902, one day prior to the Kahilina decision (Tr., p. 37); that Frank also mortgaged said lands to one Kobayashi (Tr., p. 38), which mortgage was assigned to one Peterson, August 18, 1902 (Tr., p. 41)—that is, subsequent to the Kahilina decision, and on the same day Peterson assigned the same to plaintiff in error (Tr., p. 42); that Frank mortgaged the same lands to plaintiff in error, August 13, 1902—that is, subsequent to the Kahilina decision (Tr., p. 44); that Frank's said interest was attached by an alternative writ out of the Supreme Court of Hawaii on December 16, 1902, and, after sheriff sale, conveyed by sheriff's deed, dated February 7, 1903, to the plaintiff in error (Tr., p. 52).

The plaintiff in error, claiming as assignee of all of the interests of two brothers, who were parties to the Kahilina case, of one brother, who was not, of four sisters who were, and of one sister who was not, is estopped from denying the Kahilina case, is *res judicata* as to her. Nor can she claim any relief from the rule because Catherine was not a party, and on that ground reopen the full consideration of the Bertelmann will.

The Kahilina case was one on the construction of a will, not on the nature of the rights and liabilities of one litigant as against another. In other words, the decision was conclusive as to the interests of the

beneficiaries in the land devised not as to any questions of personal rights or liabilities among themselves. The minority opinion as well as the majority opinion in the Kahilina case holds that each of the children of the testator (sons and daughters alike), is entitled to an equal share of the lands devised, subject to the life estate of the widow in one-third thereof (*Bertelmann* vs. *Kahilina,* 14 Haw. 378, 384, 393). In other words, the interest in the land of one is held not different from the interest of another or others of the children. Necessarily the determination of the right of one, where the rights and interests of each of the others is identical, would determine the rights and interests of each of the others of the same group.

This decision, made fourteen years ago, like a decree in probate, fixed interests in lands. The decision was final and conclusive as to all of the beneficiaries of the same group under the will, sons and daughters alike, and there has not been, and cannot now be, any appeal therefrom. As affecting title to land it would be relied upon by a purchaser to the same degree that a deed of record, or decree in probate, could be relied upon. Whether or not anyone did, or did not, rely on a judgment of record of this character begs the question. Being a judgment of record affecting title to land, of which no one can claim not to have had notice, the *right* to rely thereon cannot be questioned. Plaintiff in error says (Plaintiff's Brief, p. 19), "There is no evidence whatever that anyone, either a party or not a party to that case, has ever acted or omitted to act in re-

liance upon that decision." We cannot perceive how the question of applicability of the doctrine of *res judicata,* or *stare decisis,* for that matter, would be affected or elucidated thereby. Anyone had the right to rely on the majority opinion in that case and could, if so desired, have the temerity to rely on the majority opinion.

We submit that the majority decision in the Kahilina case is the law of the case in this court in so far as the nature and quantity of the interest given to the beneficiaries under Articles "Third" and "Fourth" of the will, are concerned, and that the only questions before the Supreme Court of Hawaii in this case were, and the only questions before this Court are, was the vested interest of Catherine, mother of the defendants in error (the only one or ones who are entitled to, but have not, and do not, by bringing this action based on her vested right, raise the question of inapplicability of the doctrine of *res judicata* in favor of the Kahilina decision), divested by her death before the expiration of the 25 year lease period; was the condition named in clause "Three" of the will rendered impossible of performance, and hence void, by the death of Catherine during the 25 year lease period; can Catherine's vested interest, now held by inheritance by her children, be divested by the payment to her children, before November 1, 1916, of $5,000; can the condition be properly and legally executed by the plaintiff in error under her claim of grantee all of the interests, rights and powers of the sons under Article "Third" of the will, or, in other words, was the privilege, option or

interest, or by whatever name it might be called, given the sons in Article "Third" of the will to pay each of the daughters, or surviving daughters, $5,000 and thereby "enter into full possession" of all the lands of the testator, a personal privilege, option or interest, and, as such, nonassignable.

The decision of the Supreme Court of Hawaii in the Kahilina case, as affirmed by the majority opinion of the decision in this case, was the final decision of a court of last resort, determining property rights which should not be disturbed and is a law of property and *res judicata.*

26 A. & E. Ency. 181.

This contention on the part of the defendants in error is further supported by the decision of the Supreme Court of the United States in *John Ii Estate* vs. *Brown,* 235 U. S. 342, 35 Sup. Ct. Rep. 106, 59 Law ed. 259, wherein it was held:

> "That a decision of the Supreme Court of the Hawaiian Islands construing a Hawaiian will, should not be declared invalid by the Federal courts on grounds mainly of local form and procedure and wholly of local control—especially where, after Hawaii had become a Territory of the United States, the Territorial Supreme Court held that the decision in question could not be collaterally attacked."

This case turned on the construction given by the Supreme Court of Hawaii before annexation of the will of John Ii, and as to the nature and quantity of the estate taken by Irene, daughter of the testa-

tor, as against her children under the provisions of the will—that is, whether Irene had a fee simple title or an estate for life only. The Supreme Court of Hawaii decided that Irene, after she bore a child, became the owner in fee simple of the estate, and it was this decision which was relied upon as an adjudication concluding the case before the Supreme Court of the United States.

In other words, the question of *res judicata* was specifically raised and decided and it was held that the Supreme Court of Hawaii, being then the court of last resort, by its decision concluded all of the rights between the parties and that that decision must be respected by the Supreme Court of the United States, especially since annexation that decision was affirmed by the Territorial Supreme Court in another decision by that court on the same will.

The Court says, in part:

> "The chief objection that is urged to the conclusiveness of the decision is that after the opinion of the Supreme Court no further proceedings were taken in the case. This seems to be answered by the decision next mentiond, and by the analogy, if not by the letter, of the statute then in force as to cases stated; that the case, the submission, and the written decision, shall constitute the record."
>
> Id., 264.

The question was raised in that case that the children did not appear to have had separate counsel and were not served with the bill in equity, al-

though their names were inserted as parties, and hence the decision of the Territorial Supreme Court was not *res judicata* as to them, but the court held:

> "It appears from the decision of the court that the counsel represented and pressed their interest against that of their mother, and it seems to us not permissible to declare the highest court, of what was then a foreign jurisdiction, did not know its own power, and was proceeding in a manner that the court in another country might pronounce wholly void."
>
> Id., 264.

The second proceeding brought before the Territorial Supreme Court was an attempt to have the previous decision of the Supreme Court declared void and the interest of Irene adjudged to be only a life estate. The bill was dismissed on demurrer, and the Supreme Court of Hawaii expressed the opinion that the previous decision precluded a collateral attack by the minors.

The Court then said:

> "It appears to us surprising to suggest that the highest court of the Hawaiian Islands did not decide in accordance with the requirement of the law, of which that court was the final mouthpiece; and that courts of another jurisdiction, sitting long afterwards, know its duties and powers so much better, as to be entitled to pronounce its proceedings void. The caution required in such a venture, even as against less authoritative decision, has been stated and re-

stated, from *United States* vs. *Perchemann* 7 Pet. 51, 95, S. L. ed. 604, 620, to *Michigan Trust Co.* vs. *Ferry,* 228 U. S. 346, 354, 57 Law ed. 867, 874, 33 Sup. Ct. Rep. 550. And when it is added that the grounds for the supposed invalidity are matters mainly of form and local procedure, and wholly of local control, it seems to us plain that the judgment must be reversed."

Id., 265.

A. (3)

Majority decision in Kahilina case. (Plaintiff's Brief, p. 23.)

This is stated by the plaintiff in error (Plaintiff's Brief, p. 23) to be incorrect. It is submitted that not only is this majority opinion correct, but that it is a matter which cannot now be enquired into for the reasons stated under the foregoing heading as to law of property and *res judicata.* Reference is hereby made to that case and its reasoning and conclusions (*Bertelmann* vs. *Kahilina,* 14 Haw. 378). Moreover both the majority and minority decisions rendered by the Supreme Court of Hawaii in this case affirm the principle laid down in the Kahilina case that the daughters took a present vested estate in fee simple defeasible in the manner provided for in the will. The plaintiff in error, who still insists (Plaintiff's Brief, p. 31) that the minority opinion in the Kahilina case was and is the right decision, attempts to make it appear that Chief Justice Robertson, who wrote the minority opinion in this

case, has, in the minority decision, abandoned the ruling made by the majority opinion in the Kahilina case, that the daughters took a present vested interest in fee. A careful reading, however, of the Chief Justice's dissenting opinion, not only shows that he has not abandoned that ruling in the Kahilina case but has re-affirmed it.

The plaintiff in error stated the view of the Chief Justice as follows:

> "In the first place, even if viewed as vested, the estate devised to the daughters is, as pointed out by Chief Justice Robertson in his dissenting opinion in this case, a conditional limitation rather than estate upon conditions subsequent." (Plaintiff's Brief, p. 23.)

What the Chief Justice said was:

> "Strictly speaking, I think, the estate given each of the daughters was not an estate upon condition, but a limitation. The condition precedent to be performed by the sons is that they should pay, etc." (Tr., p. 90.)

And again:

> "The general rule, which, it is conceded is well settled that a condition precedent must be literally performed, should not be enforced in case of a will when the intent of the testator would be thereby defeated." (Tr., p. 92.)

The only difference between the majority and minority opinions in this case is as to matter left undisposed of in the Kahilina decision, and, as to that, the majority opinion holds it to be a condition subse-

quent, while the minority opinion holds it to be a condition precedent. As to matter disposed of in the Kahilina case both opinions agree that the daughters took a present vested interest in fee.

It is unnecessary to dwell further on this point, since the plaintiff in error, under the next heading of her argument (Plaintiff's Brief, pp. 31 and 32), abandons all distinctions as to kind or character of estates as immaterial.

A. (4)

Immaterial whether devise to daughters was of a vested or contingent remainder or a conditional limitation. (Plaintiff's Brief, p. 31.)

Upon this point the plaintiff in error says in her brief:

> "Under the theory of the defendants in error and of the majority of the court below, the condition is a condition subsequent. Under our claim it is a condition precedent. Under Chief Justice Robertson's view it is, strictly speaking, neither precedent nor subsequent, but is simply an event or series of events which marks the termination of the estate devised to the daughters. But whether it is a condition subsequent or a condition precedent or a contingency or condition marking the termination of one estate and the beginning of another, it is all the time one and the same condition." (Plaintiff's Brief, p. 32.)

The defendants in error agree to the foregoing as an expression of the various views, except as to

the views of the Chief Justice, which were, and are, that it was a condition precedent.

The plaintiff in error then proceeds to say:

> "The only question is, what is that condition? What is it that the sons are required to do?" (Plaintiff's Brief, p. 33.)

The defendants in error submit that the foregoing, together with what the sons can now do, or their purported assignee, can now do, is precisely the whole matter in issue on this appeal. Was or was not the court below right in the construction it put on this condition and its performance or nonperformance?

The plaintiff in error contends that the construction of this condition, and the performance or nonperformance thereof, involves a question of survivorship, and that there should be applied thereto the usual principles governing and construing the use of the word "survivors" in a will. (Plaintiff's Brief, p. 34 et seq.)

The defendants in error contend, on the other hand, that Catherine having acquired a present vested estate in fee, as was held and finally disposed of in the Kahilina case, which was subject to be divested by the performance of a condition subsequent, as was held by the majority opinion in this case, or by a condition precedent, as was held by the minority opinion, and that the use, or meaning of, "daughters or surviving daughters," has been finally disposed of, as to the kind of estate devised to Catherine, as well as their application to the performance of the condition, by the majority opinion in the Ka-

hilina case, and by the decision appealed from, and for the reasons therein stated.

B. (1)

Words of survivorship—rules of construction —to which period referred. (Plaintiff's Brief, p. 34.)

Devise to individual—death before testator —lapse. (Plaintiff's Brief, p. 44.)

Devise to a class—death before testator—survivors take all. (Plaintiff's Brief, p. 45.)

Construction of will of Bertelmann—what contingencies stated in Article "Third" are. "Surviving daughters" means those surviving at the expiration of the 25 year lease. (Plaintiff's Brief, p. 47.)

Under this heading and as a matter of rejoinder, the defendants in error group the next four headings of the argument of the plaintiff in error, as contained in her brief, to wit, headings 5, 6, 7 and 8 as covering the same subject. In this portion of her argument the plaintiff in error seeks to again reopen the question of survivorship with reference to the kind of estate given to Catherine and by this means the opportunity of applying the rules of construction, where words of survivorship are used, to the divesting of Catherine's estate, irrespective of whatever kind of an estate she may have acquired under the will as held in the various majority and minority opinions of the Supreme Court of Hawaii.

As above stated, the question of survivorship does not and cannot enter into the case at this stage

thereof. The Kahilina case settled that once and for all time. Under the Kahilina case the words of the will "pay to each one of my daughters or surviving daughters" (Tr., p. 22), have come to mean, in relation to the performance of the condition contained in Article "Third" of the will: (a), to each of my daughters, individually and severally, who survive the 25 year lease period, and who may not have died within the one year thereafter, and to the heirs of those, individually, who may have died before the expiration of the 25 year lease period or who may have died during the one year thereafter without being paid; or, (b), to each of my daughters, individually and severally, who survive the 25 year lease period and as to those who may have died before the expiration of the 25 year lease period, or within the one year thereafter without being paid, the performance of the condition has become impossible.

In other words, the numerous cases cited by the plaintiff in error under this heading (Plaintiff's Brief, p. 34 et seq.), relate to gifts given to surviving children, the words surviving being construed to designate persons or classes in whom an estate should go or vest. In this case an estate has already been held in the Kahilina case to vest in Catherine and the question now turns on the divesting, or nondivesting, of that estate.

No question of survivorship can be raised as to the *performance of the condition* prescribed in Article "Third" of the will. The estate given to Cath-

erine under the Kahilina decision is to her personally, not as a member of a class. This estate has been inherited by her children, the defendants in error herein.

The defendants in error attach hereto, marked Exhibit "A," and made a part of this, their brief, the decision in *"Bertelmann* vs. *Kahilina,"* 14 Haw. 378, in support of the contentions herein made and of the correctness of the majority opinion in that case and of the incorrectness of the contentions made by plaintiff in error hereof in her brief herein, and the incorrectness of the minority decision in the Kahilina case.

C.

The so-called condition subsequent has not become impossible of performance. Even if Catherine's children now own a one-ninth interest, plaintiff in error is entitled to pay them $5000 and thus defeat their interest and herself become the "undisputable" owner of all of the lands mentioned in Article "Third." (Plaintiff's Brief, p. 70 et seq.)

Under this heading the plaintiff in error, in her brief, again brings in the question of "survivorship" as bearing on the performance of the condition prescribed in Article "Third" of the will, which estate descended to her heirs, the defendants in error herein, but controverts the majority opinion in this case that by reason of the death of Catherine, before the expiration of the 25 year lease period, the condition became im-

possible of performance, and supports the minority opinion that, although a condition precedent is usually strictly enforced, the supposed predominant intent of the testator should be followed, and the condition could be performed by payment of $5,000 to the heirs of Catherine, the defendants in error herein.

The argument of defendants in error as to "impossibility of performance" is contained below. Subject to that and the question of assignability of the option given the sons under clause "Third" of the will, defendants in error believe that the statement by the plaintiff in error is correct, that the interest of the defendant in error may be defeated by the payment to them of $5,000 by the plaintiff in error. We contend, however, as will be seen below, that not only has the condition become impossible of performance, but that the plaintiff in error has not succeeded to the option of the sons, because of the nonassignability thereof.

Defendants in error, therefore, on this, and on all other points raised by this appeal, attach hereto, marked Exhibit "B," and made a part of this, their brief, the decision of the court below in this case, contending that the majority opinion therein is correct and conclusive and if not, then the minority opinion therein is correct and conclusive.

D.

Assignabilty of sons' interests. (Plaintiff's Brief, p. 82.)

Assignability of vested remainders. (Plaintiff's Brief, p. 83.)

Assignability of contingent remainders and executory devises. (Plaintiff's Brief, p. 84.)

The common-law rule, if any, in restraint of alienation is law in Hawaii. Complete freedom of alienation is the rule and policy in Hawaii. (Plaintiff's Brief, p. 101.)

The sons' privilege or right to pay $5,000 and to cause the lands to befall on them was not purely personal but was assignable. (Plaintiff's Brief, p. 111.)

Option. (Plaintiff's Brief, p. 115.)

In the discussion of the foregoing headings of her brief, plaintiff in error still adheres to her construction and applicability of the words, "surviving daughters," stating again (Plaintiff's Brief, p. 83) that, "it is immaterial whether the estate given to the daughters is vested or contingent." We submit that it was vested and all that remains to be done is to apply the condition to the daughters as individuals and not as a class.

The defendants in error are inclined to the belief that the privilege or option is not assignable, not merely because of the nature thereof, but because giving it assignability would defeat the "predominating intent" of the testator.

V.

IMPOSSIBILITY OF PERFORMANCE OF CONDITION.

Defendants in error contend that the condition prescribed in Article "Third" is a condition subsequent, as was held in the majority opinion of the

decision appealed from, and for the reasons set forth in the majority opinion, which are hereby made a part of this brief; or, as an alternative, a condition precedent, as was held in the minority opinion of the decision appealed from, and for reasons set forth in the minority opinion, which are hereby made a part of this brief.

In either case, whether subsequent or precedent, the authorities are unquestionable that a literal compliance must be made therewith. That this is the general rule is conceded in the minority opinion of the decision appealed from. Such being the case, the performance of the condition prescribed in Article "Third" of the will has become impossible of performance through the death of Catherine, and cannot be performed as to Catherine's children, the defendants in error herein, as such performance would not constitute a literal compliance with the terms of the condition as prescribed in Article "Third" of the will. Literal compliance with the will required payment by one or more of the sons. Chief Justice Robertson, however, in the minority opinion of the decision appealed from, takes the ground that, while ordinarily a literal compliance must be made of a condition precedent to divest a vested estate, the rule should not be followed in this case on account of what he decides is the predominating intent of the testator, viz., that the lands in question should fall upon his sons then surviving after the expiration of the 25 year lease period.

VI.

PREDOMINATING INTENT OF TESTATOR.

Defendants in error contend that the intent of the testator as found in the majority opinion in the Kahilina case, viz.:

> "He meant to give his land to all of his children equally, subject to the widow's interest, and, as one method of division, after the expiration of the lease, to give the sons the option of obtaining the whole upon making proper payments in money to the others." (*Kahilina* vs. *Bertelmann,* 14 Haw. 378, 384.)

was and is the true "predominating intent" of the testator, and that, if his sons were unable, or did not, or could not, exercise the option, it was not to be exercised by a stranger. This intent is clearly borne out by Article "Fourth" of the will which provides that in case none of his sons should exercise the privilege, the lands should be divided equally among all of the children absolutely and in fee simple, free from all condition. Following the same intent, it is urged, that if the sons did not, or could not, exercise the privilege as to any one daughter, that daughter, or her heirs, should have the land clear and free of all condition in the same manner as was provided in Article "Fourth" of the will. In other words, the testator did not intend that strangers should have the benefit of the privilege which he intended for his sons personally. The intent of the testator appears to be, and we so submit, that while he intended that all of the lands should befall

to his sons, under prescribed circumstances, that if such lands did not, or could not so befall, such lands should not go to a stranger under the option or privilege given to his sons personally.

The defendants in error contend that the privilege given to the sons was a purely personal privilege which, as to them, is not assignable, and which cannot be exercised by the plaintiff in error claiming as assignee of the sons.

Catherine, and her children, by inheritance under her, have been held to have a vested interest in fee simple in one-ninth of the lands in question. Irrespective of the present value of said one-ninth interest, and said one-ninth interest can be computed, on the basis of the rent at 6%, to be worth $10,000 or more, the plaintiff in error urges that she, as purported assignee of the sons, and claiming the option or privilege of the sons, can now step in and divest the defendants in error and deprive them of their inheritance by a payment to them of $5,000 for the land, valued on the basis above, of the worth of $10,000. This could not have been the intent of the testator, particularly in view of the provision he made in Article "Fourth" of his will, that in case none of the sons could perform the condition, the lands should go to his sons and daughters, or the heirs of such who may have deceased before the time for the performance of the condition, in equal shares absolutely and in fee simple and free from all condition.

VII.

CONCLUSION.

It is submitted that the ruling of this Court should be:

(a) To affirm the majority opinion of the decision appealed from; or, (b), affirm the minority opinion of the decision appealed from, and that judgment should be entered accordingly.

Respectfully submitted,

E. A. MOTT-SMITH,

Attorney for Defendants in Error.

Dated, Honolulu, T. H., September 15, 1916.

Exhibit "A."

DECISION IN BERTELMANN vs. KAHILINA, 14 Haw. 378.

FRANK C. BERTELMANN and HENRY G. BERTELMANN,

vs.

SUSAN BERTELMANN KAHILINA; HELEN SMITH, wife of WILLIAM SMITH and WILLIAM SMITH her Husband; ANGELINE MOSSMAN, Wife of HARRY MOSSMAN and HARRY MOSSMAN her Husband; MINNA HALL, Wife of WILBUR HALL and WILBUR HALL her Husband; HATTIE BANNISTER, Wife of ANDREW BANNISTER and ANDREW BANNISTER her Husband.

Original.

Submitted June 13, 1902. Decided July 29, 1902.

FREAR, C. J., GALBRAITH and PERRY, J. J.

A testator devised certain land, which was subject to a 25 year lease at a rental of $6,000 a year, to his wife, three sons and six daughters, as follows: (1) To his wife a life estate of $2,000 or, in case of a change in the lease, one-third the net income, and, in case of her death, said $2,000 a year or one-third to be equally divided among all his children or surviving children, and to each of the children or surviving children, an equal share of the remaining $4,000 or two thirds of the income; (2) * * * ; (3) At the expiration of the lease, to his sons or *then* surviving sons or son, the land, provided such sons or son should then pay $5,000 to each of the daughters or surviving daughters, but, in case one or two of the sons should be unable to pay such amounts within a year from that time, the other son or sons to have the right to buy the whole by paying (a) to each daughter or surviving daughter $5,000, (b) to the short-coming son or sons each $5,000, and that by doing so the sons or son will enter into full possession, and their or his right and title be undisputable, provided they comply with the said conditions, and (c) to the wife, a life rent of $2,000 a year, to be a charge on the estate;

(4) Should none of the sons be able to pay these amounts, then the land to be sold or leased again according to the best interests of the family, the proceeds to be equally divided among the children or their lawful heirs and assigns, after the distributive share of dower is given to the wife. The wife and all the children survived the testator. Held,

The widow took a life estate in one-third the land, subject to be divested upon the performance of the conditions prescribed in the third item, in which case she would thereafter have a fixed sum of $2,000 a year, which would be a charge on the land.

The children took, subject to the widow's interest, equal estates until the expiration of the lease, with vested remainders in fee, the former merging in the latter so as to make present vested estates in fee, defeasible as to the interest of the daughters and shortcoming son or sons upon the performance of the prescribed conditions by the other son or sons, the sons meanwhile having contingent devises as to such interests.

OPINION OF THE COURT BY FREAR, C. J.
(PERRY, J., Dissenting.)

The question is one of the construction of a will. The material parts of the will and other facts are set forth in the dissenting opinion of Mr. Justice Perry.

There are three classes of devisees—the testator's wife, his sons, and all his children, comprising three

sons and six daughters. The question is, what interests have they under the will?

As to the wife, there seems to be little or no doubt. The first item of the will clearly gives her a life estate in one-third of the land in question. The fourth is in harmony with this. But upon the happening of certain contingencies set forth in the third item her estate may be divested, in which case she would thereafter have in place thereof a fixed yearly sum which would be a charge on the land, to be paid by the son or sons who would take the whole land under that item upon the happening of such contingencies.

As to the children, they have equal vested interests under the first item, subject to the widow's interest, until the expiration of the lease to the Kilauea Sugar Company. The main question is, what have they after that under the third and fourth items?

As to the sons, in so far as they take under the third item, they take, subject to the charge in favor of the widow, a fee—whether defeasible or indefeasible, vested or contingent, by way of remainder or executory devise, remains to be seen.

If the payments prescribed in that item are conditions precedent, they of course cannot have a vested interest under that item until they perform the conditions, and the vesting of their estates will necessarily be contingent upon such performance. In such case they would take by way of contingent executory devise, to vest and take effect in possession upon such performance and at the same time divest the daughters and shortcoming sons or their heirs

of any interests that they might otherwise have either under the fourth item of the will or by descent. Whether such other interest would be by devise or descent would depend upon whether the devise in the fourth item would vest at or before the expiration of the lease or on nonpayment by the sons within a year thereafter—that is, according to whether the children would take under the fourth item immediately by way of remainder subject to be divested or by way of executory devise a year after, holding meanwhile as heirs.

If those payments are conditions subsequent, the sons take under the third item by way of remainder, to take effect in possession immediately upon the expiration of the lease and to be subject to be divested, upon nonperformance of the conditions, in favor of the devisees under the fourth item. Such remainder would be contingent. For, although courts lean strongly in favor of early vesting, they must yield to the clearly expressed intention of the testator. In this case the devise, to take effect in possession at a future time, being to the sons "or *then surviving* sons or son," it is impossible to say until that time arrives which sons, if any, will be entitled to take under that description, and, in order that a remainder may be vested, it is necessary not only that it be capable of taking effect in possession whenever the particular estate may determine, but that there be a person in being and ascertained who answers the description of the remainderman at some time during the continuance of the particular estate and not merely at its termination.

20 Am. & Eng. Enc. of Law, 838 et seq. and notes; 2 Underhill, § 865. Here the contingency is inherent in the description of the devisees. There is not even a direct devise to all the sons with a divesting clause or devise over in the event of the death of one or more during the prescribed period.

In any event, therefore, until the expiration of the lease, the sons would have, so far as the third item is concerned, only a contingent interest. And this perhaps would be as far as it would be necessary to go in this case if this item alone were concerned. But it will be necessary to decide what all the children take under the fourth item, and in doing so it will be necessary or at least convenient to say further whether the payments are conditions precedent or subsequent and therefore whether the sons would take under the third item by way of remainder or executory devise.

All the children take a fee, of course, under the fourth item, in so far as they take at all under that item. There is no conversion of the land into money, for the direction to sell is not imperative. Nor does the fact that there is only a direction to sell or lease and divide the proceeds at a future time, without any express devise, prevent there being a devise or even a present vested remainder. 2 Underhill, Wills, § 866.

Under this item the children must take either a vested or contingent remainder or a contingent executory devise. It could not be a contingent remainder; for to be a remainder at all, it would have to take effect in possession, if at all, immediately

upon the expiration of the lease, but the only contingency—nonpayment by the sons—that would make it a contingent remainder, if at all, might happen at any time within a year after the expiration of the lease.

The estate therefore must be either a vested remainder subject to be divested upon the performance of the condition by the sons or else a contingent executory devise to vest and take effect in possession, if at all, a year after the termination of the lease in case the sons fail to perform the condition within that year. Which is it?

With the exception of the argument based on the direction to sell or lease and divide at a future time, which, as we have seen, is by no means conclusive, the arguments all seem to favor the theory of a vested remainder as against a contingent executory devise.

In general there is strong presumption in favor of early vesting. There is a strong presumption in favor of a remainder as against intestacy as to a portion of the estate—in this case for the short period from the expiration of the lease to the performance of the conditions in case they are performed or the end of the year in case they are not performed. There is a strong presumption that a condition imposed merely for convenience is not intended to delay the vesting of an estate—that is, is not intended as a condition precedent to the vesting, even if it should be to the enjoyment. Here the children would take under the fourth item immediately but for the allowance of a year to the sons in

which to make the prescribed payments, and that time is allowed for the sons' convenience and not for the purpose of postponing all the children.

The will itself contains nothing to clearly rebut these presumptions but on the contrary supports the view that the children were intended to take immediately upon the expiration of the lease rather than a year later. All three of these items show an intention on the part of the testator to treat all the children equally as to quantity of interest. The first and fourth items express this intention as clearly as it can be expressed. The third item merely gives the sons a privilege of obtaining all the land, but only on condition that they compensate the others for what they would otherwise have in the land. It is little more than one method of division. Accordingly, it would seem that the intention was to leave the land to all, subject to the exercise of the option by the sons, rather than to leave it to the sons subject to go over to all in case the sons should not exercise their option. The third item strongly bears out this idea. It shows that the payments therein prescribed are conditions precedent, in which case the sons could not take by way of remainder at all under that item. They could take under that only by way of contingent executory devise. The form of the proviso and its annexation to the devise itself, instead of being inserted in a subsequent clause, favors this construction. Moreover, even after the expiration of the lease it may not be known for a year which, if any, of the surviving sons will be able or willing to make

the payments. The provision for the payments to the other, the shortcoming sons as well as the daughters, also favors this construction. This and the use of the word "buy" tend to show that the testator thought the daughters and shortcoming sons already had an interest to be in a certain sense bought out. The sons may buy "the whole," as if they would not otherwise then have the whole, or as if the others already had some. And it is only "by doing so," that "they my sons, or he my son, will enter into *full* possession of *all my* lands, and their or his right and title will be *undisputable,* provided they or he (my son or sons) comply and fulfill the above-mentioned conditions." A distinction is made as between the payments to the other children and those to the widow. The latter are merely charges on the land and may extend over a period of years, and no express words of condition are set forth in connection with them, while the former are intended to be single payments respectively to be made within a limited time and are put in the form of express conditions. The sons would then at most take, not a contingent remainder, but only a contingent executory devise under the third item.

Again, if there is any distinguishing feature in the results as between vested and contingent interests, it is that a vested interest passes from the designated devisee to his heirs or assigns, while a contingent interest does not. Now, this distinction between an interest that would pass by descent or devise or conveyance even before the estate might take effect in

possession and one that would not so pass, is apparently just what the testator had in mind, as to the estate of all the children under the fourth item, for he there directs the division to be made among all the "children or their heirs and assigns," as if they could devise or convey their respective interests before the period of distribution or taking effect in possession or as if, in case they did not do so, their interests would pass to their heirs by descent in case of their death before such period. If such is the case, the children must have a vested estate.

The foregoing considerations favor the view that the sons would take a contingent executory devise as against a contingent remainder under the third item; that all the children would take a vested remainder under the fourth item as against a contingent remainder in the sons under the third item; that under both items all the children would take a vested remainder, subject to be divested as to the daughters and shortcoming sons in favor of the other sons upon their performance of the prescribed conditions as against the view that all the children on the one hand and the sons on the other hand take alternate contingent executory devises with a possible intermediate period of intestacy.

But since all the children have vested estate until the expiration of the lease as well as vested, though defeasible, remainders after that, the lesser estates are merged in the greater and all the children have present vested estates in fee defeasible as to the interests of some of them upon the other's performance of the conditions prescribed. And this would

seem to be the intention of the testator as shown in all three clauses of the will. He meant to give the land to all his children equally, subject to the widow's interest, and, as one method of division after the expiration of the lease, to give the sons the option of obtaining the whole upon making proper payments in money to the others.

The questions are therefore answered as follows:

The widow has a life estate in one-third of the land, subject to be divested by the performance of the conditions prescribed in the third item, in which case she will thereafter have a fixed sum of $2,000 a year, which will be a charge on the land.

The children have equal vested estates in fee, subject to the widow's interest, defeasible as to the interests of the daughters and shortcoming sons upon the performance of the prescribed conditions by the other son or sons, the sons having meanwhile contingent executory devises as to such interests.

GEO. A. DAVIS and F. M. BROOKS, for Plaintiffs.

ANDREWS & ANDRADE, for Defendants.

DISSENTING OPINION OF PERRY, J.

This is a submission, under the statute, upon an agreed statement of facts.

On December 12, 1891, one Christian Bertelmann, of Pilaa, Kauai, executed a will containing, among others, the following provisions: "First. In consideration of Agreement and Lease of all my lands (except 100 acres actually fenced off and two acres of taro land at Kahili), made by myself with the

Kilauea Sugar Company, Limited, for the term of 25 years, commencing November 1, 1890, and ending November 1, 1915, at the rate of $6,000 per annum, payable quarterly in advance, I make the following Arrangements.

"I give, devise and bequeath said rents as follows:

"1st. To my lawful wife, Susan C. Bertelmann, a life rent of two thousand dollars ($2,000) yearly, payable quarterly, being one-third of above mentioned rent of six thousand dollars ($6,000) or in case of any possible change in the actual agreement with the Kilauea Sugar Company, an equivalent of one-third of all net receipts or income of lands now rented to Kilauea Sugar Company. In case of Susan Bertelmann's death the above mentioned income of $2,000 a year, or equivalent of one-third as her distributive share of Dower would be equally divided amongst my children or surviving children.

"2nd. To each and every one of my children or surviving children an equal share of the four thousand dollars ($4,000.00) or the remaining two-thirds of the total income, deriving from the rent of my lands to the Kilauea Sugar Company or equivalent thereof.

"Third. At the expiration of twenty-five year's lease to the Kilauea Sugar Company, it is my sincere wish and will that my land should befall in equal shares and interest upon my three sons:—Frank Charles, Henry Godfrey, and

Christian Sylvester Bertelmann, or then surviving son or sons, provided, however, that at such a time these my sons or son, shall pay to each one of my daughters or surviving daughters the sum of five thousand dollars ($5,000.00). In case one or two of my sons should be at that time, or within a year from that time unable to furnish, produce or raise the necessary amount to pay to each one of my daughters or surviving daughters his share of the five thousand dollars ($5,000.00) per capita, the two or the one of my sons will have a right to buy the whole of my lands now leased to the K. S. Co. by paying:—

"1st. To each of my daughters or surviving daughters the amount aforesaid of five thousand dollars ($5,000.00).

"2nd. To my short-coming son or sons, the same amount of five thousand dollars ($5,000.00) each, being the same share as will be paid the daughters. By doing so, they my sons, or he my son, will enter into full possession of all my lands, and their or his right and title will be undisputable, provided they or he (my son or sons), comply and fulfill the above mentioned conditions.

"3rd. To my wife, Susan Bertelmann, a life rent of two thousand ($2,000.00) per annum, I make the payment of all these amounts above given a charge from all my estate.

"*Fourth.* Should none of my sons be able to pay these amounts, then my lands will be sold at public auction, or leased over again according to

circumstances and best advantage of my family. The money deriving from said sale or lease will be fully divided amongst my children or their lawful heirs and assigns after the distributive share of Dower will have been given to my wife, Susan Bertelmann according to law."

By other clauses of the will, which clauses are not now in dispute nor material to be considered, the testator made specific disposition of the one hundred acres and the two acre tracts mentioned in the first clause. The testator died March 15, 1895, being at the time of his death seised of the lands referred to in the will.

Christian Bertelmann left surviving him his widow, three sons and six daughters. The plaintiffs are two of the sons, the defendants Helen Smith, Angeline Mossman, Minna Hall and Hattie Bannister are four daughters and the defendant Susan Bertelmann Kahilina is the widow, named in the will as Susan Bertelmann.

The claims of the parties are thus stated in the submission: "That Frank C. Bertelmann and Henry G. Bertelmann claim that they, the said Frank C. Bertelmann and Henry G. Bertelmann, own two undivided thirds in fee simple of the said estate under said will, and the said Susan Bertelmann Kahilina; Helen Smith, wife of William Smith and William Smith her husband; Angeline Mossman wife of Harry Mossman, and Harry Mossman, her husband; Minna Hall, wife of Wilbur Hall, and Wilbur Hall her husband; Hattie Bannister, wife of Andrew Bannister, and Andrew Bannister her husband, claim

that the said Frank C. Bertelmann and Henry G. Bertelmann own no such interest in the said estate, but that they, the said Frank C. Bertelmann and Henry G. Bertelmann own, and are well entitled to, two undivided ninths of the said estate under the said last will and testament of Christian Bertelmann, deceased; that they, the said Helen Smith, wife of William Smith, and William Smith her husband; Angeline Mossman, wife of Harry Mossman, and Harry Mossman her husband; Minna Hall, wife of Wilbur Hall, and Wilbur Hall her husband; Hattie Bannister, wife of Andrew Bannister, and Andrew Bannister her husband, own and are well entitled to four undivided ninths in the lands and premises under the said last will and testament of Christian Bertelmann, deceased; that the said Susan Bertelmann Kahilina owns and is well entitled to her dower as set forth in the said last will and testament of the said Christian Bertelmann, deceased."

The questions submitted are:

"1st. What right, title or interest, have the said Frank C. Bertelmann and Henry G. Bertelmann, by, through, or under the said last will and testament of Christian Bertelmann, deceased?

"2d. Further, what right, title or interest have the said Susan Bertelmann Kahilina, Helen Smith, wife of William Smith, and William Smith her husband; Angeline Mossman, wife of Harry Mossman, and Harry Mossman her husband; Minna Hall, wife of Wilbur Hall, and Wilbur Hall her husband, and Hattie Ban-

nister, wife of Andrew Bannister, and Andrew Bannister her husband, by, through, or under the said last will and testament of said Christian Bertelmann, deceased?"

On behalf of the plaintiffs the main contention is that the three sons of decedent "took a vested interest in the realty in fee subject to be divested as to any of them in the event of their death before the expiration of the lease or upon their failure to pay the legacies provided in the will" and that their interest was "a vested remainder expectant, subject to a condition, the violation of which would forfeit their estate."

I respectfully dissent from the construction given the will by the majority. It is doubtless an elementary rule of the construction of wills that no remainder will be construed to be contingent which may consistently with the intention of the testator be deemed vested, and that the law favors the earliest possible vesting of estate and favors a remainder as against an executory devise. Still, an interest must be construed to be contingent if it is clearly so expressed and if it is necessary to do so in order to carry out the intention of the testator. So also, under like circumstances, the other less favored constructions must be adopted.

A remainder is contingent "when it is so limited as to take effect to a person * * * not ascertained, or upon an event which may never happen." *Woodman* vs. *Woodman,* 89 Me. 128. In the case at bar, the remainder, if any, is in my opinion, contingent. The devise expressed in the third clause, to take

effect at the expiration of the 25 years lease to the Kilauea Sugar Co., is to the three sons, Frank, Henry and Christian, "or then surviving sons or son." In order to take, each taker must be alive at the time named. It is impossible to ascertain now which one or more of the sons will be alive at that time. There is an uncertainty as to whether any of the sons and as to what one, if any, will ever have the right to the enjoyment of the estate. See *Bailey* vs. *Hoppin,* 12 R. I. 560, 567. For this reason alone, the remainder cannot be a vested one.

The argument is advanced that the remainder must be held to be vested rather than contingent because no disposition of the land is otherwise made for the period prior to the expiration of the lease. This position, I think, cannot be upheld. By the first clause of the will, all of the rents of the land, for the period referred to, are disposed of for the benefit of the widow and children in stated proportions. This is the equivalent of a devise of the land itself for that time—an estate for years. See 3 Wash. Real Prop. 382; *Earl* vs. *Rowe,* 35 Me. 414, 419; *Reed* vs. *Reed,* 9 Mass. 372, 373; *Caldwell* vs. *Fulton,* 31 Pa. St. 475, 479.

Another reason for regarding the remainder, if any, as contingent and not as vested, is that the testator has named another condition precedent to the vesting of the estate. Whether that condition will be performed or not, is uncertain. The condition referred to is that the surviving son or sons pay to the surviving daughters and to any delinquent son the sum of $5,000 each at the expiration of the

lease or within one year thereafter. That the provision in question was intended as a condition, is not disputed; but it is contended that the condition is subsequent. Whether a condition is precedent or subsequent is a question of construction to be determined in view of the language of each particular will. As usual, it is the intention of the testator which is to be sought. If from the language used it is clearly evident that the testator intended "that a devisee to whom property is given should perform some act prior to the vesting of the estate, and without the performance of which it will not vest, the condition is precedent. Until it is performed the devisee has no title." See 1 Underhill on Wills, section 483. In stating what the devise to the sons is, and in the same sentence, the testator in the case at bar says, "provided, however, that at such a time these my sons or son, shall pay to each one of my daughters," etc. Immediately following this is an alternative provision to be good in case one or two of the sons are unable to pay, and that is that the other two or one may have the whole property by paying to the delinquent son or sons as well as to the daughters the sums named. "By doing so," continues the testator, "they my sons, or he my son, will enter into full possession of all my lands, and their or his right and title will be undisputable," again adding, as if to emphasize the point, "*provided they or he* (my son or sons) *comply and fulfill the above mentioned conditions.*" The obvious meaning of this is that if the conditions are not complied with, the sons will not have any right or title to the lands

under this clause. Proceeding still further, the testator provides for the contingency of *none* of the sons being able to pay. In that event, he says, they are to be "sold at public auction or leased" and the proceeds divided among all the children after dower has been given the widow; in other words, in that event the lands, not yet vested in the sons, are not to go to them alone but to them and to certain other persons.

The intention of the testator seems to me to be clear. In view of the fact, however, that the sons are allowed one year after the expiration of the present lease to the Kilauea Sugar Company within which to pay the amounts stated, and that a period of time may elapse between the determination of the particluar estate and the vesting of the interest of the sons, it may be that the testator's intention cannot be carried out on the theory of a contingent remainder. If that is so, the limitation can, nevertheless, be supported as an executory devise. See 4 Kent Com., p. 246 et seq.; 1 Bouvier's Dict. 733; 1 Underhill on Wills, sec. 874 et seq. In the interval, if any, between the determination of the particular estate and the taking effect of the limitation over, the fee will be in the testator's heirs, in the absence of a residuary clause. See Kent Com., 270, 284.

The contention of the defendants seems to be, in effect, that a vested remainder is devised to the daughters, with power to sell to the sons only, and that this restriction upon the power of alienation is invalid. I think that to so construe the language of the will would do violence to the intention of the

testator. The mere use of the word "buy" in the first paragraph of the third clause, above quoted, cannot have the effect contended for. The word was there used evidently in the sense of "acquire title to." If the argument of defendants were good at all, that the power or right to "buy" from the daughters presupposes a devise of the fee to the daughters, then such devise would of necessity be regarded as having been to the "shortcoming sons" as well as to the daughters. Such a construction, to wit, that each of the daughters and each of the shortcoming sons has a vested remainder, subject though it be to being divested, finds no support in the language of the will. If any vested remainder whatever could be held to have been given, it would be to each of the nine children. The latter, however, was not, as it seems to me, intended by the testator. If it had been, then certainly after he had once caused such estates to be vested in each and all of his nine children, he would not have permitted a divesting of any of such interests in favor of some or all of the sons without providing some compensation therefor. Yet, what he said was that the surviving son or sons have the whole property, not by paying to the surviving daughters and shortcoming sons *and to the heirs of any deceased daughter and to those of any deceased son,* but by paying to the surviving daughters (meaning daughters surviving at the expiration of the lease and not at the death of the testator) and to the shortcoming sons only. This strongly supports the view that as between the three sons on the one hand and the nine children on the

other the devises were of alternate contingent remainders, or, at least, of alternate contingent executory devises. In other words—and the testator wrote the four clauses in their natural order—if the sons pay the surviving daughters and shortcoming sons, they shall have all the property; if they do not so pay, the nine children shall have it all. If the testator omitted to provide, in certain contingencies, for the heirs of deceased sons or daughters, the court cannot remedy the defect. As I understand the majority opinion, it is not therein decided whether or not the condition named in the third clause requires the payment by the surviving sons of $5,000 to the heirs of any deceased son or daughter in order to defeat what is adjudged to be the vested interest of each son and daughter.

The use of the word "assigns" in the fourth clause is not sufficient, I think, to overcome the indications contained in the other parts of the will showing that the devise was intended to be of contingent interests; or is it inconsistent therewith. "Heirs" and "assigns" were named by the testator in that clause as persons to take by way of substitution for those dying or assigning, respectively, before that time. A conveyance of a contingent remainder, if for a valuable consideration, would be enforced at least in equity and would operate by way of estoppel to pass the interest or possibility of interest of the grantor to the assignee. There are authorities even to the effect that contingent remainders are alienable. See, for example, *Belcher* vs. *Burnett,* 126 Mass. 230, 231; *Drake* vs. *Brown,* 68 Pa. St. 223, 225.

The questions submitted should be answered as follows:

(1) The widow is entitled, (a) to a one-third interest in the land until the expiration of the lease to the Kilauea Sugar Company, (b) in case one or more of the sons pay as provided in clause 3, to a life rent of $2,000 per annum secured by a charge upon the property, and (c) if none of the sons pay as provided by clause 3, to a life estate in one-third of the land.

(2) Until the expiration of the present lease to the Kilauea Sugar Company, each of the children of the testator is entitled to an equal share of the remaining two-thirds interest in the land.

(3) At the expiration of said lease, the son or sons at that time surviving, will, provided he or they pay $5,000 to each of the daughters then surviving, and to each of the "shortcoming" sons, if any, take the fee of said lands, either as contingent remaindermen or by way of executory devise, subject to the charge in favor of the widow. In that event, the then surviving daughters and shortcoming sons, if any, will be entitled to the sum of $5,000 each and no more.

(4) During the period, if any, intervening between the expiration of the present lease and the compliance by the son or sons with the condition as to payment, the heirs of the testator will be entitled to the land as provided by law, subject to the widow's right of dower.

(5) If none of the sons comply with the condition of clause 3, then, subject to the widow's life estate, all the land goes to the nine children.

Exhibit "B."

DECISION IN SCOTT MINORS vs. LUCAS.

23 Haw. 338.

June, 1916.

Syllabus.

WALTER W. SCOTT, a Minor, JANET M. SCOTT, a Minor, RUBENA F. SCOTT, a Minor, and the BISHOP TRUST COMPANY LIMITED, a Corporation, Guardian of the Estate of Said WALTER W. SCOTT, JANET M. SCOTT and RUBENA F. SCOTT, Minors,

vs.

MARY N. LUCAS.

No. 927.

SUBMISSION UPON AGREED STATEMENT OF FACTS.

Argued April 13, 1916. Decided June 13, 1916.

ROBERTSON, C. J., WATSON AND QUARLES, JJ.

Wills—Vested remainder—Defeasance—Condition impossible of performance.

Where by a last will and testament a remainder in fee is vested in a devisee subject to defeasance by a condition subsequent and prior to the performance of the condition such condition becomes impossible of performance, the vested remainder absolute in the devisee and no longer subject to the defeasance provided for in the will.

OPINION OF THE JUSTICES BY QUARLES, J.

(ROBERTSON, C. J., dissenting.)

This is a controversy submitted upon agreed facts to obtain a decree quieting title to an undivided one-ninth interest in and to certain lands described in the submission of facts. The plaintiffs, Walter W. Scott, Janet M. Scott and Rubena F. Scott, minor children of Catherine Haunani Scott (nee Bertelmann), appear by their guardian as plaintiffs, and Mary N. Lucas, who claims the said undivided interest, appears as defendant. The settlement of this controversy depends upon the construction of certain provisions in the last will and testament of Christian Henry Bertelmann, upon which the merits of the controversy must be decided. This will has heretofore been before this court for construction and the provisions here involved construed (*Bertelmann* vs. *Kahilina,* 14 Haw. 378), where it was held that each of the six daughters of the testator, under the first and fourth items of the will, took vested remainders in fee subject to defeasance upon payment to each of them of the sum of $5,000 by the three sons, or one or more of them, of the testator, as provided in the third item of the will. That item reads:

> "At the expiration of the 25 years' lease with the Kilauea Sugar Company it is my sincere wish and *will* that my lands shall befall in equal shares and interest upon my three sons *Frank Charles, Henry Godfrey* and *Christian Sylvester Bertelmann* or then surviving sons or son. Provided, however, that at such a time these my sons or son shall pay to each one of my daughters or

surviving daughters the sum of *five thousand dollars* ($5,000.00). In case one or two of my sons should be at that time, or within a year from that time unable to furnish, produce or raise the necessary amount to pay to each one of my daughters or surviving daughters his share of the $5,000.00 per capita, the two or the one of my sons will have a right to buy the whole of my lands now leased to the K. S. Co. by paying:

"1. To each of my daughters or surviving daughters the amount aforesaid of $5,000.00.

"2. To my shortcoming son or sons the same amount of $5,000.00 each, being the same share as will be paid to my daughters. By doing so, they my sons or he my son will enter in full possession of all my lands; and their or his right and title will be undisputable, provided they or he (my sons or son) comply and fulfill the above-mentioned conditions.

"3. To my wife Susan Bertelmann a life rent of $2,000.00 per annum. I make the payment of all these amounts above given a charge upon all my estate."

The defendant has purchased all of the interest of the three sons and of all of the daughters except the late mother of the plaintiffs, she having died September 10, 1915, leaving the plaintiffs as her surviving children. The lease mentioned in the will has expired, and the one year in which the sons, or one of more of them, may purchae or acquire the interest of their sisters under the third item of the will, herein-

above quoted, is now running. It is contended on behalf of the defendant that Mrs. Scott, mother of the plaintiffs, having died prior to the expiration of the lease, the plaintiffs have no interest in the lands in question, and that the provision as to payment of $5,000 to each of the daughters does not apply to the interest which Mrs. Scott would have if she had survived the expiration of the lease; and, that the defendant takes the whole freed from the charge of said $5,000. In furtherance of this contention it is earnestly insisted on the part of the defendant that the former decision to the effect that Mrs. Scott and the other daughters took vested remainders in fee is incorrect and that their interests, respectively, are, and were, contingent upon their survival of the expiration of the lease, and upon the failure of the sons, or one or more of them, to pay to the daughters the $5,000 each. These contentions were, we think, correctly disposed of in the former decision of this Court, for the reasons therein stated. The mother of the plaintiffs took a vested remainder in fee, subject to be defeated by the payment to her by the sons, or one or more of them, of the sum of $5,000 within one year after the expiration of the lease. We do not feel at liberty to disturb that decision which has been acted upon for nearly fourteen years, and which has become an established rule of property so far as the rights here involved are concerned. The former decision, which simplifies and narrows the questions to be here decided, correctly holds that the acquisition of the interests of the daughters under the will by the sons, or one or more of them, was a mere privi-

lege which depended upon a condition precedent—the payment of the prescribed sums—while the defeasance of the vested remainder in the daughters depended upon a condition subsequent—the payment to each daughter of the sum of $5,000 at the time and in the manner prescribed in the will. The difference between a condition precedent and a condition subsequent is well described in *Winthrop* vs. *McKim,* 51 How. Prac. 323, where the court at page 327 says:

"Conditions precedent are such as must happen or be performed before the estate can vest.

"Conditions subsequent are such as when they happen or are performed, or are not performed, as the case may be, divest, curtail or abridge an estate already vested.

"It is also a well-settled rule that, where an estate is to arise upon a condition precedent, if the condition becomes impossible no estate or interest grows thereupon.

"Upon the other hand, if the performance of a condition subsequent becomes impossible, the condition is void, and the estate vests as though no such condition had been imposed."

These rules are supported by practically all authority, English and American, from the time of Sir William Blackstone to the present. Blackstone (Book 2, 154, 156) says:

"An estate on condition expressed in the grant itself, is where an estate is granted, either in fee simple or otherwise, with an express qualification annexed, whereby the estate granted shall either commence, be enlarged, or be defeated, upon perform-

ance or breach of such qualification or condition. These conditions are, therefore either *precedent* or *subsequent.* Precedent are such as must happen or be performed before the estate can vest or be enlarged; subsequent are such, by the failure or nonperformance of which an estate already vested may be defeated. * * * These express conditions, if they be *impossible* at the time of their creation, or afterward become impossible by the act of God or of the feoffer himself or if they be *contrary to law,* or *repugnant* to the nature of the estate, they are void." See 2 Jarman, Wills, 5th ed., pp. 10, 11.

It is well settled that a condition precedent to the vesting of an estate must be strictly construed and fully performed (*Nevious* vs. *Gourley,* 95 Ill. 206, 213; *Martin* vs. *Ballou,* 13 Barb. 119, 132; Kent's Com. (13 ed.) 135, and authorities cited in note c.).

It is also well settled that the performance of a condition subsequent whereby a vested estate is divested must be strictly construed and fully and literally performed else the vested estate remains absolute. The death of Mrs. Scott, mother of the plaintiffs, prior to the termination of the lease, rendered the condition subsequent, whereby the estate which vested in her should be divested, impossible of performance. There is no provision in the will whereby the estate so vested in Mrs. Scott should be divested in any mode or manner other than the one prescribed in the will itself, i. e., the payment to her of $5,000, a privilege granted to the sons, or one or more of them, by the testator. That condition becoming impossible by the act of God is as though it

was never made. The plaintiffs inherited from their mother the estate bequeathed to her by the will and vested in her as decided by the former decision of this Court. That vested estate could only be defeated by a strict and literal performance of the condition prescribed (1 Jarman, Wills, 5th ed., 827; 2 Jarman, Wills, 5th ed., 11, 13; Roper on Legacies, 618, 766, 767, 783; *Ridway* vs. *Woodhouse,* 7 Beav. 437, 49; Eng. Reprint, 1134; *Ill. Land & Loan Co.* vs. *Bonner,* 75 Ill. 315, 327; *McFarland* vs. *M. McFarland,* 177 Ill. 208, 217.) Conditions subsequent are not favored in law (*Davis* vs. *Gray,* 16 Wall. 203, 230), and are "construed beneficially in order to save, if possible, the vested estate or interest; and if such condition prove illegal, or incapable of performance, whether as against good morals or as impossible under any circumstances, or is rendered impossible in a particular case and under existing circumstances, the gift, whether of real or personal property, relieved of the condition, becomes absolute in effect" (*Harrison* vs. *Harrison,* 31 S. E. 455, 458).

We have examined a large number of decisions, both English and American, and find them all in harmony with the rules herein announced. It follows that the plaintiffs inherited from their mother the estate in the lands in controversy vested in her by the will of her father, freed from the condition subsequent whereby the same could be divested if their mother was now living. Under the conclusion at which we have arrived the sons, or either of them, cannot now defeat the estate which vested in the mother of the plaintiffs in her lifetime by reason of

the provisions of the said will, which descended to and vested in the plaintiffs.

The agreed statement of facts is silent as to whether either of the sons is prepared to and desires to purchase the interest of the plaintiffs in the lands in question. Neither of the sons of the testator is a party to this submission. The defendant claims, in the event that it is held that the vested remainder which the mother of plaintiffs took under the will was not defeated by her death prior to the expiration of the lease, the right to defeat the interests of the plaintiffs by payment to them of the sum of $5,000, by virtue of her having purchased the interest of each of the testator's sons. This contention fails under the conclusion reached. If the death of Mrs. Scott, mother of the plaintiffs, prior to the expiration of the lease did not make the condition subsequent by which the remainder vested in her by the will could be defeated impossible of performance, as we hold it did, then it would be necessary to decide whether or not the privilege given the sons, or one or more of them, under the third paragraph of the will, to purchase the estate in remainder which vested in the daughters at the death of the testator, passed to the defendant by reason of the deeds from the sons to her. This would involve the consideration of the question as to whether the privilege given the sons, or one or more of them, of buying out the daughters was a mere personal privilege to be performed by the sons only. A study of the will shows clearly a manifest intent on the part of the testator

that his three sons and six daughters should share equally; that the sons, at the expiration of the lease, jointly should have the right of buying out the interests of the daughters if all of the sons were prepared to and desirous of so doing; but, if one or two of the sons should not be so prepared, and so desire, the son or sons so prepared and desirous should have that right. It was a mere privilege accorded to the sons, or one or more of them, if their desires and ability to purchase should permit, of acquiring all the leased lands. The privilege granted seems personal, and no intention can be found in the will that the daughters should be obliged to sell their respective interests in the lands in question at the stated price of $5,000 to anyone other than the sons, or one or more of them. The condition upon which the remainder which vested in Mrs. Scott, mother of the plaintiffs, could be defeated having become impossible of performance by reason of her death, thus terminating the privilege granted the sons of buying her interest, and defeating the remainder which vested in her, it is unnecessary to determine whether or not that privilege could be exercised by an assignee of the sons.

A judgment may be prepared decreeing that the defendant has no right, title or interest in or to the undivided one-ninth interest in and to the lands described in the agreed statement of facts claimed by the plaintiffs as heirs of Catherine Haunani Scott, vested in said plaintiffs in fee, and adjudging the plaintiffs to be the absolute owners in fee of said un-

divided one-ninth interest in and to the said lands, and it is so ordered.

E. A. MOTT-SMITH, for Plaintiffs.

A. PERRY, for Defendants.

SCOTT vs. LUCAS, 23 Haw. 338.

ROBERTSON, C. J., dissenting.

DISSENTING OPINION OF ROBERTSON, C. J.

The material portions of the will of the late Mr. Bertelmann are set forth in the former opinion of this Court reported in 14 Haw. 378, 385, 386.

The clearly expressed intention of the testator was that the sons should have the right to acquire the whole of the leased land upon giving to the daughters what the testator evidently considered a fair equivalent for the interests devised to them. It was his will "that my lands shall befall in equal shares and interest upon my three sons"; that they "will have a right to buy the whole of my lands now leased to the K. S. Co."; and that "by doing so, they my sons or he my son will enter in full possession of all my lands, and their or his right and title will be undisputable," etc. Thus did the testator express a dominating intent. It being a lawful intent it is the duty of this Court to see that it is carried out. Strictly speaking, I think, the estate given each of the daughters was not an estate upon condition subsequent, but a limitation. The condition precedent to be performed by the sons is that they should pay "to each one of my daughters the sum of five thousand dollars." The third paragraph of the will, taken by itself, supports the view that the remain-

ders of the daughters after the expiration of the lease would be defeated by death during the term of the lease. Upon a strict literal interpretation of that paragraph it would have to be held that the sons could acquire title to the whole land by paying $5,000 to each of such daughters as might be living when the time came for the sons to exercise the right given them, i. e., between the date of the expiration of the lease and one year thereafter. Such literal interpretation is not followed, however, because it is not in harmony with the general intent of the testator as shown by the will as a whole, as held by this Court in the former case, that the daughters were intended to have vested estates in fee. That is, estates which would descend to their respective heirs. But this departure from the language used in the third paragraph, which is required by the entire context, should not be carried to such an extent as to defeat the primary and clearly expressed intent of the testator that his sons should have the right to acquire the whole land by paying for the interests given to the daughters and their heirs. The contingency of the death of a daughter before the expiration of the lease was not provided for. Yet in order to effectuate the intent manifested by the testator it must be held that as to the estate of a deceased daughter which has passed to her heirs the sons should have the right to pay those heirs the sum which the will stated should have been paid to that daughter had she lived. The primary intent of the testator having been ascertained from the will as a

whole the language used in any particular paragraph must, if inconsistent with that intent, be made to bend to it. "In case of doubt a will should be construed in favor of a general or primary intention rather than a particular or secondary one; and where in such a case a particular intention, or particular terms, as expressed in some part of the will, are inconsistent with and repugnant to the testator's general intention as ascertained from all the provisions of the will, the general intention must prevail." 40 Cyc. 1393. The general rule, which it is conceded is well settled, that a condition precedent must be literally performed, should not be enforced in the case of a will when the intent of the testator would thereby be defeated. The general and primary intent was that the sons, or one or more of them, should have the whole land; the language used with reference to the condition upon which they should acquire it was the expression of a secondary and particular intent. The means was secondary to the end, and should yield or conform to it. To hold otherwise, it seems to me, is to sacrifice the substance to the shadow upon a narrow and technical view. This is not a case where the literal performance of a condition has become impossible. The condition precedent prescribed in the third paragraph of the will could be literally performed, and, as the agreed facts show, has been performed, notwithstanding the death of one of the daughters, by making the payments to the surviving daughters. Properly construed, however, the condition precedent which the

testator imposed to the acquisition by the sons of the estates given to the daughters was not that they should make payment to the surviving daughters only, but that they should pay the sum named for the interest given to each of the daughters and their heirs. The right to acquire the interests of the daughters was not, I think, a mere personal privilege which could not be assigned to and exercised by a vendee of the sons. In my opinion the judgment should be that the plaintiffs are seised in fee of an undivided one-ninth of the land subject to the right of the defendant to acquire the same by the payment of $5,000.